

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOEL HOENNINGER et al

Plaintiffs,

v.

LEASING ENTERPRISES, LTD., d/b/a

PERRY'S RESTAURANTS, LTD.,

Defendant.

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§ CIVIL ACTION NO. 1:14-cv-00798
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JOINT STATUS REPORT

In response to the Court's Order of June 15, 2016 (*Dkt. No. 148*), PLAINTIFFS JOEL HOENNINGER, et al. (Plaintiffs) and LEASING ENTERPRISES, LTD., D/B/A PERRY'S RESTAURANTS, LTD. (Defendant) file this Joint Status Report.¹

I. PLAINTIFFS' STATEMENT

The Fifth Circuit affirmed Judge Hughes, even though no depositions had occurred in the prior case (based on Judge Hughes instruction). Discovery should now proceed to determine whether Perry's had a good faith belief it was following the law in the face of litigation against it. Discovery should also be focused on whether Perry's willfully violated the FLSA in order to profit off of Perry's illegal wage deductions. On average, Perry's received six figures per year on this illegal arrangement. Although Perry's contends it at some point stopped this illegal arrangement, no discovery has occurred yet (per this Court's request to wait until the Fifth Circuit issues an opinion).

II. DEFENDANT'S STATEMENT

The United States Court of Appeals for the Fifth Circuit issued on June 14 its ruling in *Steele v. Leasing Enterprises, Ltd.*, the related Houston case identified to this Court last year. The Fifth Circuit affirmed Judge Hughes' ruling that the credit card offset fee imposed by Defendant as part of its cashing out of servers' credit card tips on a nightly basis did not comply with the tip requirements of the Fair Labor Standards Act. It also affirmed Judge Hughes' findings that this system was not imposed by Defendant willfully or in bad faith.

Following Judge Hughes' initial pre-judgment ruling on this matter in September, 2014, Defendant ceased the practice of nightly cashing out of servers' credit card

¹ Counsel exchanged drafts of proposed text for inclusion in this Report, and were only able to agree to submit the following "statements" of the respective parties.

tips in early to mid-October 2014. As a result, to resolve that portion of the case, and without admitting liability, Defendant proposes to

- * identify those individuals who have opted into this case who participated in the nightly cash out system prior to mid-October, 2014, and
- * reimburse them the difference between the \$2.13 per hour tip credit and the \$7.25 minimum wage in effect for all hours they worked at Perry's up to two years before the termination of the nightly cash out policy. As with payment of wages in an ordinary payroll situation, any such payment shall be subject to all applicable governmentally mandated withholdings.

Defendant requests that each such recipient deliver to Plaintiffs' counsel "in escrow" an appropriate signed release in advance of payment, so that each release can be delivered by Plaintiffs' counsel to Defendant's counsel simultaneously with the delivery of the payment in question. The Court would have to resolve the question of the amount of attorney's fees, if any, to be awarded.

Any other claims by any claimant for work performed as a server after mid-October 2014 remain in dispute.

III. RULE 16 / 26 CONFERENCE

The parties respectfully request the Court to schedule the appropriate FED. R. CIV. P.

16/26 Conference.

JACKSON WALKER L.L.P.

/s/ *Lionel M. Schooler*

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